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Human Rights Committee

Consideration of reports submitted by States parties under article 40 of the Covenant

Second periodic reports of States parties due in 2008

Republic of Namibia*

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Foreword by the Honourable Utoni Nujoma (MP), Minister of Justice of the Republic of Namibia

1. Namibia shares the concern of the United Nations and the international community for human rights and is committed to promoting the recognition and enforcement of civil and political rights. The country's struggle for freedom from colonialism and oppression was to achieve the recognition of human dignity. The inclusion of the fundamental rights and freedoms in Chapter 3 of the Namibian Constitution was the first step taken by our founding fathers towards achieving the promotion and protection of human rights.

2. Chapter 3 of the Namibian Constitution incorporates all the fundamental human rights and freedoms contained in the International Covenant on Civil and Political Rights and other international human rights instruments. Article 132 of the Namibian Constitution prohibits any enactment, repeal or amendment of any law that will diminish or detract from the fundamental rights and freedoms.

3. Namibia is governed in accordance with the pillars of a constitutional State such as the rule of law and respect for human rights. Central to the above is the promotion of democratic values which allows its citizens to regularly express their satisfaction or dissatisfaction with the government of the day through the ballot box.

4. Namibia has made great strides in promoting and protecting the rights of its minority groups by passing progressive legislation and policies aimed at ameliorating the living conditions of the said communities. Civil and political rights are enjoyed by men and women equally, with women's rights being a common feature in many of the national policies and laws. Namibia is a State party to the Convention on the Elimination of All Forms of Discrimination against Women and has also submitted her country report 1995-2009 on the implementation of the Beijing Platform for Action: Beijing +15.

5. Namibia wishes to strengthen her role in the promotion and protection of human rights by continuing to work with the United Nations treaty bodies in submitting her periodic reports.

I. Introduction

6. This periodic report is submitted pursuant to Article 40 of the International Covenant on Civil and Political Rights (ICCPR) which requires States parties to submit reports on the measures they have adopted in giving effect to the rights recognized under the Covenant and on the progress made on the enjoyment of those rights. The report consists of the introductory section which includes information on the reporting methodology; it then provides information and responses to the concluding observations of the Human Rights Committee on the last report, adopted at its 2216th meeting (CCPR/C/SR.2216) on 26 July 2004. Part III of this report provides information on the substantive rights recognized under the relevant articles of the Covenant since the last report. The information contained in this report covers the period from 2007 to 2012.

Reporting Methodology

7. In order to meet and respect her international obligations, Namibia established an Inter-Ministerial Committee on Human Rights and International Humanitarian Law. The operations of the Committee are coordinated by the Ministry of Justice. This report was compiled by the Ministry of Justice based on information received from Government Offices, Ministries and Agencies (OMAs) as well as research information and reports from

relevant non-governmental organizations (NGOs). Civil Society Organizations were given an opportunity to give comments on the draft report.

II. Responses to the concluding observations of the Human Rights Committee (CCPR/CO/81/NAM)

Paragraph 6

The Committee is concerned that article 144 of the Constitution may negatively affect the full implementation of the Covenant at the domestic level (art. 2).

The State party should reconsider the status of the Covenant vis-à-vis domestic law in order to ensure the effective implementation of the rights enshrined therein.

In response

8. The Namibian Constitution contains a chapter on basic human rights and fundamental freedoms that is enforceable/justiciable and is consistent with the Universal Declaration of Human Rights. The Namibian Constitution in its Preamble embraces and emphasizes the principles of equality and inherent dignity of all members of the human race. Thus, Chapter 3 of the Namibian Constitution incorporates all the fundamental human rights and freedoms contained in the ICCPR. The following civil and political rights are enshrined in the Namibian Constitution:

(a) The right to life;

(b) The right to personal liberty;

(c) The guarantee against torture or cruel, inhuman or degrading treatment or punishment;

(d) The guarantee against slavery and forced labour;

(e) The right not to be discriminated against on grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status;

(f) The protection against arbitrary arrest and detention;

(g) The right to a fair trial;

(h) The right to privacy;

(i) The right to marriage and to found a family; and

(j) The right to participate in peaceful political activities.

9. In addition, the following fundamental freedoms are enshrined in Article 21 of the Constitution:

(a) Freedom of speech and expression;

(b) Freedom of thought, conscience and belief, which includes academic freedom in higher institutions of learning;

(c) Freedom to practice any religion;

(d) Freedom to peaceful assembly;

(e) Freedom of association, including to form and join trade unions and political parties;

(f) Freedom of movement within the country;

(g) Freedom to reside and settle in any part of Namibia; and

(h) Freedom to practice any profession, or carry on any occupation, trade or business.

10. In terms of Article 23 of the Namibian Constitution, the right to life, fair trial, prohibition against torture and other cruel or inhuman treatment or punishment cannot be derogated from or suspended even if a state of emergency has been declared. Article 6 of the Constitution explicitly abolishes the death penalty.

11. By virtue of Article 144 of the Namibian Constitution, the ICCPR is part of Namibian domestic law. The effect of Article 144 is that the rights and freedoms provided in the ICCPR are enforceable within Namibia by the judiciary and quasi-judicial bodies. The rights and freedoms contained in Chapter 3 are justiciable and fully comply with the legal obligations as spelt out in Article 2 (3) of the ICCPR which provides that victims of human rights violations should be awarded remedies.

12. Article 5 of the Namibian Constitution specifically provides that the fundamental rights and freedoms enshrined in Chapter 3 shall be respected and upheld by the Executive, Legislature, Judiciary, all organs of the Government , its agencies, all natural and legal persons in Namibia, and shall be enforced by the courts.

13. Furthermore, Article 5 is strengthened by Article 25 (2) of the Namibian Constitution, which gives aggrieved persons the right to approach a competent court for a remedy. In addition, Article 25 (4) of the Namibian Constitution empowers the courts to deal with cases of human rights violations, and to award monetary compensation to victims.

Paragraph 7

The Committee welcomes the establishment of the institution of the Ombudsman. It notes that the legislation concerning the Ombudsman requires further strengthening (art. 2).

The State party should strengthen the legislative mandate of the institution of the Ombudsman and provide further resources to it, so that it may be in a position to fulfil its mandate efficiently.

In response

14. The Office of the Ombudsman has submitted proposed amendments to the Ombudsman Act No. 7 of 1990 to the Minister of Justice with the aim of strengthening its human rights mandate.

15. The Ombudsman reported that the budget allocated for the promotion of human rights was increased from N$ 400 000 (2004) (US$47 058-00) to N$ 1 000 000 (N$ 117 647-00) for the year 2011-12.

16. The Office of the Ombudsman established two more offices, one in the south of the country, at Keetmanshoop and another office in the north, at Oshakati, to make it more accessible to the public. Another regional office in the western part of the country was opened in December 2012.

Paragraph 8

The Committee acknowledges the information provided by the State party on the implementation of its Views adopted under the Optional Protocol with regard to cases No. 760/1997 (Diergaardt et al. v. Namibia) and No. 919/2000 (Müller and Engelhard v. Namibia). It nevertheless notes with concern the absence of a

mechanism to implement the Committee's Views adopted under the Optional Protocol (art. 2).

The State party should establish a mechanism to implement the Committee's Views adopted under the Optional Protocol.

In response

17. Namibia is of the view that the issues which were raised in the Diergaardt case were properly addressed by Namibia's Supreme Court. In addition, Article 25 (2) of the Namibian Constitution provides for a mechanism, which gives aggrieved persons the right to approach a competent court for a remedy.

18. With regard to the case of *Müller and Engelhard v. Namibia No. 919/2000*, Namibia is of the view that the matter was considered by the Supreme Court of Namibia which indicated that it was justifiable in terms of our laws.

Paragraph 9

The Committee welcomes the Married Persons Equality Act, which eliminates discrimination between spouses. It nevertheless remains concerned at the large number of customary marriages that are still not registered and about the consequent deprivation of women and children of their rights, in particular with regard to inheritance and land ownership (arts. 3, 23 and 26).

The State party should take effective measures to encourage the registration of customary marriages and to grant the spouses and the children of registered customary marriages the same rights as are granted to the spouses and children of marriages under civil law. The future Bill on Intestate Inheritance and Succession and the future Bill on Recognition of Customary Law Marriages should take these considerations into account.

In response

19. Namibia has undertaken a lengthy and thorough review of both policy and legislation to eliminate vestiges of colonial discrimination. This is currently underway through the repeal of obsolete laws project of the Law Reform and Development Commission. Namibia also has a progressive judiciary which has actively defended the constitutional rights of its citizens.

20. Parliament has already taken notice of the continued discrimination and difficulties of customary marriages, despite the fact that article 66 of the Namibian Constitution recognizes both customary law and common law on an equal footing. A report on Intestate Succession was finalized and submitted to the Minister of Justice during the month of June in 2012.

21. Although it appears that the process of passing the bill into law is taking a long time, it does not mean that those women and children under customary marriages have no remedies in our laws.

22. Our courts have applied and interpreted article 10 of the Namibian Constitution as a remedy to come to the rescue of those women and children.

23. Article 10 of the Constitution provides that:

"(a) All persons shall be equal before the law;

(b) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social economic status."

24. The Common law which prohibits children born out of wedlock from inheriting intestate from their fathers has been addressed by legislature. Parliament has passed the Children's Status Act, Act No. 6 of 2006 in this regard; Section 16(2) of the Act provides that:

> "Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage".

25. The matter of children born out of wedlock has also been addressed by our courts. Through judicial intervention the common law rule of prohibiting such children from inheriting has been declared unconstitutional. In the leading case of *Lotto Frans // Inge Paschke and others,* Case No: (T) I 1548/2005 (unreported), the Plaintiff did not inherit when his father died because of the common law rule that a child born out of wedlock cannot inherit intestate from their father. In deciding this matter, Heathcote AJA held that: "the differentiation indeed amounts to discrimination against illegitimate children. By design or result, the social stigma which attached to adulterous and incestuous children was transferred to children born out of wedlock. This appears to be the case simply because the maxim "een wyft maakt geen bastaard" had been echoed from generation to generation, apparently without much legal philosophical reflection; having come to the conclusion, I hold that the common law rule did indeed become invalid, and unconstitutional on 21 March 1990".

26. The Communal Land Reform Act, Act No. 5 of 2002, has also resolved the issue of land rights to women who are married under customary law. Section 26(2) of the Act provides that:

> "Upon the death of the holder of a right referred to in subsection (1) such right reverts to the Chief or Traditional Authority for re-allocation forthwith;
>
> To the surviving spouse of the deceased person, if such spouse consents to such allocation; or
>
> In the absence of a surviving spouse, or should he or she not consent as contemplated in paragraph (a) ,to such child of the deceased person as the Chief for Traditional Authority determines to be entitled to the allocation of the right in accordance with customary law".

27. Based on the above provisions, many women who have been deprived of their property by the family members of the deceased were empowered. It is also worth noting that some traditional authorities in Namibia are today headed by women, a good sign for gender balance, which gives women the courage to participate in social and domestic issues that affect them on a daily basis.

Paragraph 10

> *The Committee appreciates the efforts undertaken by the State party to combat HIV/AIDS and to provide wider sexual education in this regard. However, these efforts are not adequate in view of the magnitude of the problem (art. 6).*
>
> *The State party should pursue its efforts to protect its population from HIV/AIDS. It should adopt comprehensive measures encouraging greater numbers of persons suffering from the disease to obtain adequate antiretroviral treatment and facilitating such treatment.*

In response

28. The Government adopted a national health policy for the period 2010/2020. Most of the primary health care policies of the World Health Organization have been incorporated into that policy.

29. In an effort to combat HIV/AIDS, the Government launched a Strategic Plan Programme in 1999, and in 2009 the Government launched HIV/AIDS Policy that calls on all stakeholders to contribute to the fight against HIV/AIDS and Prevention. A considerably high budget is allocated to fight HIV/AIDS and Prevention.

30. For the Global Fund HIV Programme the budget was as follows: 2005 to September 2012 – N$1, 205, 333, 135-00; and the actual expenditure was: 2005 to September 2012 – N$961, 231, 971-00.

31. The Government also launched the Third Medium Term Plan (MTP3). The MTP3 national goal is to reduce the incidences of HIV/AIDS below the epidemic threshold of one percent. The Ministry of Health and Social Services had achieved great strides in the five components of dealing with HIV/AIDS, namely, Enabling Environment, Prevention; Access to treatment; Care and Support Services; Impact mitigation; and Integrated and Coordinated Programme Management. These achievements included among others, launching of the National HIV/AIDS Policy and the hosting of the first National HIV/AIDS Male Leaders Conference aimed at empowering them to mainstream HIV/AIDS response to all sectors in the country. Male circumcision is also being encouraged by Government as one effort to reduce HIV/AIDS.

32. The results from the biennial Sentinel Survey show that incidence of HIV/AIDS raised from 19.3% in 2000 to 22.0% in 2002, and stabilised thereafter at 19.7% in 2004 and 19.6% in 2006 to 16.8% in 2010. All Namibians have access to health facilities and antiretroviral medicine which is offered to them free of charge. Approximately 131 158 of infected people need ARV treatment in the country, and 75,681 people were on ARV treatment as at March 2010 which increased to 110 053 people during 2012/13 financial year. The programme started in 2004 at all Government hospitals.

Paragraph 11

The Committee notes with concern that the crime of torture is not defined in domestic criminal law and is still considered a common law offence to be charged as assault or crimen injuria *(art. 7).*

The State party should, as a matter of priority, make torture a specific statutory crime.

In response

33. Progress has been made pursuant to the Committee's advice that Namibia criminalises torture as a specific crime through legislation in order to supplement constitutional provisions. In this regard, the Law Reform and Development Commission investigated the issues of torture with a view to recommend criminalization of the offence. The Commission has reported that it has proposed a Bill on the crime of torture for consideration by the Minister of Justice.

Paragraph 12

Although the Committee notes the decrease in reported violations of human rights in the northern parts of Namibia, it regrets that no extensive fact-finding initiatives have been undertaken to determine accountability for alleged acts of torture, extrajudicial killings and disappearances (arts. 6, 7 and 9).

The State party should establish an effective mechanism for the investigation and punishment of such acts.

In response

34. The allegations of enforced disappearances surfaced after the attacks on the Caprivi Region in August 1999. These allegations were raised by the National Society for Human Rights now known as NamRights, a local human rights organization. These alleged human rights violations have been investigated by the Government and so far no evidence has been found in support of the allegations.

35. Following allegations of torture of suspects in the Caprivi High Treason case, the Inspector General of the Namibian Police issued policy directives to strengthen Namibian legal instruments on human rights. The Police Force also offers human rights courses at its Police Training College in an effort to promote and build human rights capacity amongst its members.

Paragraph 13

The Committee appreciates the efforts undertaken by the State party in increasing the number of magistrates throughout the country, so as to ensure strict observance of the 48-hour rule for bringing a suspect before a trial judge. Nevertheless, it remains concerned that cases of prolonged pretrial detention not compatible with article 9 of the Covenant may continue to occur.

The State party should continue its efforts to ensure respect of the 48-hour rule and should closely monitor all cases where this rule is not respected.

In response

36. Article 11 of the Namibian Constitution prohibits arbitrary arrest and detention. All arrested persons or detained persons must be brought before a magistrate or judicial officer within 48 hours of their arrest or detention where possible, failing which a person cannot remain in custody. In addition, such arrested persons must be informed promptly in a language which they understand of the grounds for the arrest.

37. Article 7 of the Namibian Constitution stipulates that no one shall be deprived of personal liberty, except according to the law. This provision specifically authorizes deprivation of liberty, such as imprisonment if established by law. This provision is comparable with Article 9(1) of the ICCPR which provide for the right to liberty.

38. The Namibian courts have already expressed opinion on the matter saying that what is possible or reasonably possible must be judged in light of all the prevailing circumstances in any particular case. Account must be taken of such factors as the availability of magistrates, police manpower, transport, distances among other things, but that convenience is certainly not one of such factor. The provisions of Article 11(3) of the Namibian Constitution are comparable to Article 9 of the ICCPR.

39. There are 33 magistrates and a number of periodical courts countrywide, and in most cases this situation enables the accused persons to appear before a magistrate within 48 hours or as soon as possible thereafter. The Office of the Ombudsman has a constitutional and statutory duty to investigate matters in which the Ombudsman has reason to suspect that the right to a fair trial is being diminished or violated. This may also include the investigation of complaints of alleged unlawful detention and wrongful arrest. There have been cases where accused persons were released by the police on police bail because of the 48 hour rule depending on the nature and seriousness of the crime.

40. The Government is committed to ensure that the accused persons are brought before court within 48 hours or as soon as possible.

Paragraph 14

While the Committee takes note that, at present, magistrates are mandated to carry out independent inspections of detention centres, the Committee reiterates the need for an additional external and independent body mandated with the task of visiting the centres and receiving and investigating complaints emanating therefrom (arts. 9 and 10). A strong and independent mechanism is also required for the investigation of allegations of acts of police brutality in general.

The State party should consider establishing an independent body that would be able to visit all places of detention and conduct investigations into violations of rights and abuses in prisons and places of detention, and to investigate acts of police brutality in general.

In response

41. This issue of visiting prisons was taken up by the Office of the Ombudsman. The Ombudsman regularly visit police cells and prisons and report to Parliament. As noted above, the Ombudsman has a constitutional and statutory duty to investigate matters in which he has reason to suspect that fundamental rights and freedoms are being diminished or violated. Apart from the regular visits by the Ombudsman, the Police have a Disciplinary Unit which deals with complaints relating to the misconduct of police officers during the execution of their duties.

42. The issue of mechanisms to enable the verification of complaints about ill treatment at the hands of the correctional officials has been addressed by the new Namibian Correctional Service Act (No. 9 of 2012). This legislation provides for a Correctional Inspectors who shall specifically conduct investigations into the problems and complaints of offenders related to decisions, recommendations, acts or omissions of Correctional Officers or any other person under the control and management of or performing services for or on behalf of the Commissioner that affect offenders either individually or as a group.

Paragraph 15

The Committee takes note of the reports that certain media personnel and journalists have faced harassment and that these allegations have not been investigated either promptly or thoroughly by the competent authorities (arts. 18 and 19).

The State party should take appropriate steps to prevent threats to and harassment of media personnel and journalists, and ensure that such cases are investigated promptly and with the requisite thoroughness and that suitable action is taken against those responsible.

In response

43. A significant level of media freedom has existed in Namibia since independence. According to the *Reporters Without Borders, World Press Freedom Index* rankings during 2010 and 2011, Namibia topped Africa on press freedom. In 2012 Namibia was ranked 20th out of 174 countries in the world. Namibia is one of the more media-friendly countries in Africa. Freedom of speech and of expression and freedom of the press and other media provided for in terms of Articles 18 and 19 of the ICCPR are guaranteed under Article 21(1)(a) of the Namibian Constitution.

44. In terms of Article 21(1)(a) of the Namibian Constitution all persons have the right to freedom of speech and expression, which includes freedom of the press and other media. The fundamental freedom has to be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedom, which are necessary in a democratic society and integrity of Namibia, national security, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

45. It should be noted that any journalist or media personnel whose fundamental rights and freedom guaranteed by the Namibian Constitution has been infringed or threatened has the right to approach the court to enforce such right or freedom as provided in terms of Article 25(2) of the Namibian Constitution.

46. He or she also has the right to approach the Office of the Ombudsman; the Ombudsman will investigate the complaint which is brought before him or her. All cases or complaints which are brought before the Ombudsman concerning the violation of fundamental rights and freedoms will be investigated promptly and suitable remedies or recommendation will be made.

Paragraph 16

The Committee notes with appreciation the decision of the Supreme Court in The State v. John Sikundeko Samboma and others (known as the Caprivi treason trial) reaffirming the right of persons in Namibia to legal aid. However, the Committee is concerned that access to this right is not properly ensured in practice (art. 14).

The State party should take measures to strengthen the implementation of the legal aid scheme and ensure the provision of legal aid to individuals entitled to receive it, in particular by increasing the availability of funds.

In response

47. The Ministry of Justice has a Directorate of Legal Aid which is established to administer legal aid scheme pursuant to the Legal Aid Act No. 29 of 1990. The Directorate of Legal Aid has an obligation to render free legal aid in both civil and criminal cases. The criteria for granting legal aid are the level of income and the merits of the case. A person can apply for legal aid if he /she cannot afford the services of private legal practitioners. An applicant may be granted the services of a legal aid counsel or a private legal practitioner may be instructed to represent the applicant.

48. Our courts have handed down decisions in a number of cases on the right to legal representation and right to legal aid in Namibia. To ensure that legal aid is given to individuals entitled to receive it, our courts ruled that if the trial of an indigent accused is likely to be rendered unfair because he or she cannot afford legal representation, there would be an obligation on the state to provide such legal aid.

49. In the case of *Government of the Republic of Namibia and Others v. Mwilima and all the Other Accused in the Treason Trial 2002 NR 235 (SC)*, the Supreme Court ruled that there is an obligation on the Government to provide legal aid to the accused persons. In this case the accused persons (Applicants) were all awaiting trial prisoners in a treason trial. They had been refused Legal Aid and had launched an application in the High Court for an order directing the State that such legal aid should be granted. The High Court ruled in favour of the accused/applicants, and ordered that the Director of Legal Aid should provide such legal aid. The State appealed the case to the Supreme Court. The Supreme Court confirmed the ruling of High Court and held that such right stem from the right to fair trial in terms of Article 12 of the Namibian Constitution, lack of representation could result in unfair trial and that the Government has obligation to uphold these rights as contained in

the Constitution. The Court held that there is an obligation on Government, to provide legal aid at least in those cases where the interests of justice so require and where the accused is unable to pay for such services from his/her own resources.

Paragraph 17

The Committee is concerned that the State party is not complying fully with the obligation to ensure the right to be tried without undue delay as enshrined in article 14, paragraph 3 (c), of the Covenant, especially taking into account the number of cases that remain pending.

The State party should take urgent steps to guarantee that trials take place within a reasonable period of time. Special measures should be taken to address the backlog of cases, in particular through the necessary increase in the number of judges.

In response

50. The provisions of Article 12(1) (b) and 11 of the Namibian Constitution are comparable to Article 14 of the ICCPR. In the case of *S v. Heidenreich 1995 NR 234 (HC)* the court considered what constitutes a reasonable time for the purposes of Article 12(1) (b). The court held that what is required when considering whether the time which has lapsed in bringing an accused to a trial is reasonable or not, is a balancing exercise and ultimately a value judgment. The court held that: where the trial of the accused has not taken place within a reasonable time and accordingly, the accused is entitled to a relief in terms of Article 12(1) (b) which entitles him or her to be released.

51. The Government has taken measures to reduce the backlog of criminal cases through the appointment of additional judicial officers and prosecutors, and with the provision of legal aid to indigent persons. The Government was also working on a strategy to improve the working conditions of legal officers in order to reduce the turnover of staff which contributes to the backlog in the courts. Both the Superior and Lower Courts are implementing case management systems to overcome administrative backlog in the management of the case flow.

Paragraph 18

The Committee expresses its concern about the absence of any mechanism or procedure for the removal of judges for misconduct (art. 14).

The State party should establish an effective and independent mechanism and provide for a proper procedure for the impeachment and removal of judges found guilty of misconduct.

In response

52. The removal of judges from office is provided for under Article 84 of the Namibian Constitution. Article 84(2) of the Constitution provide that judges may only be removed from the office on the ground of mental incapacity or for gross misconducts and in accordance with the provisions of Article 84(3) hereof. Article 84(3) provides that the Judicial Service Commission shall investigate whether or not a judge should be removed from office on such grounds, and if it decides that the judge should be removed, it shall inform the President of its recommendations. Article 84(5) provides that while investigation is being carried out into the necessity of the removal of a Judge in terms of this Article. The President may, on the recommendation of the Judicial Service Commission and, pending the outcome of such investigations and recommendations, suspend the judge from office.

53. The rules and regulations governing the procedures for the removal of judges from office are made by the Judicial Service Commission as provided under the Judicial Service Commission Act, Act No. 18 of 1995.

54. The Judicial Service Commission is an independent body established under Article 85 of the Namibian Constitution. The Commission derives its powers and functions from the Constitution and the Judicial Service Commission Act. Article 85 of the Constitution provide that the Judicial Service Commission shall consist of the Chief Justice, a Judge appointed by the President, the Attorney-General and two members of the legal profession (from a private practice) nominated in accordance with the provisions of an Act of Parliament by the professional organizations representing the interests of the legal profession in Namibia.

55. In *S v. Teek (SA 44/2008) 2009 NASC 5 (28 April 2009)*, a judge was accused of a crime and was charged. The Judicial Service Commission requested the accused to provide reasons why he should not be relieved from his duties as stipulated in the Namibian Constitution and in terms of the Act. On the recommendation of the Judicial Service Commission, he was suspended by the President, following allegations of criminal conduct, thereafter charges were brought against him.

Paragraph 19

The Committee takes note of the draft Child Status Bill, aimed at enabling children born out of wedlock to have the same rights as those born within wedlock. The Committee notes with concern, however, that children do not get the type of special protection that they require in the area of the administration of justice, in particular in the criminal justice system (arts. 10, 14 and 24).

The State party should take measures to establish an appropriate juvenile criminal justice system in order to ensure that juveniles are treated in a manner commensurate with their age.

In response

56. The Child Status Bill has since been acted into law, as the Child Status Act No. 6 of 2006. The Act has done away with discrimination against the children born outside marriage; they now have the same rights as those born inside the marriage. Namibia is in the process of developing a juvenile justice system that will be more responsive to the needs of children in conflict with the law and more in line with international standards. To this end, a Child Justice Bill was drafted in 2003 and is still in its consultation stages with the stakeholders. The Bill contains legal provisions that will reform the present system based on principles of "peacemaking" and "reconciliation". The most important provisions of the Child Justice Bill pertain to age and criminal capacity, police procedures, release policies, diversion, juvenile courts and sentencing. It revives a presumption that a child under ten years of age cannot legally be prosecuted for an offence.

Paragraph 20

While the Committee commends the State party for the enactment of the Combating of Domestic Violence Act, which criminalizes domestic violence, the Committee regrets that, despite the wide prevalence of domestic violence, so far only 62 persons have been prosecuted and no victims have been compensated (art. 23).

The State party should encourage further use of this Act, especially by training the police force and sensitizing it to the needs of victims. Additional special shelters for those suffering from domestic violence should be created.

In response

57. Violence against women and children is a serious concern in Namibia. Reports indicate that half of the victims suffer violence at the hands of the persons they know. However, Government and stakeholders have made tremendous efforts to address it. In 2007, during the 16 Days of Activism against gender based violence campaign, the Government and various key stakeholders launched an annual awareness campaign. The Government also launched the "Zero Tolerance Campaign against Gender Based Violence including Human Trafficking", to raise public awareness and highlight ways in which the public could help to address the problem.

58. The Criminal Justice Forum was established in 2007 to address problems regarding justice delivery, e.g. to know how to get evidence from children. The Ministry of Gender Equality and Child Welfare has held legal literacy and gender sensitization and awareness workshops/meetings covering a wide range of issues from gender based violence (GBV), sexual reproductive health, motivational talks in schools are ongoing and reaching about 30,288 participants from 2002-2009 of which 75% were women.

59. IEC materials on GBV (1st and 2nd volumes of the Gender Watch, in 2008 and 2009 respectively 1st and 2nd volumes of the "I" stories, in 2007 and 2008 respectively video documentaries based on the Combating of domestic violence Act, radio documentaries covering baby dumping, passion killings, femicides and Human Trafficking) were developed. Advocacy programme targeting Parliamentarians of the Parliamentary Standing Committee on Human Resources Management Development and Community on GBV, HIV/AIDS, Sexual Reproductive Health and Poverty issues has been undertaken and is ongoing. The Regions already visited include Oshikoto, Karas, Hardap, Erongo and Omaheke. The programme aims to increase knowledge of parliamentarians on gender issues affecting women and children and increase their response to these issues.

60. The Ministry of Gender Equality and Child Welfare in 2007 held a National Conference on Gender Based Violence under the theme "Unifying Action to Eliminate GBV in our society". The conference attracted about 350 delegates representing various stakeholders as Politicians, the Judiciary, the Police, Medical Personnel, Forensic Services, Social Workers, Prisons Personnel, Traditional Authorities, the Church, the Media, the Community and Civil Society.

61. In addition, the Ministry of Gender Equality and Child Welfare initiated a KAP study to identify cultural practices that fuel GBV and the spread of HIV/AIDS, as well as cultural practices that are positive and needs reinforcement to strengthen the fight against GBV and HIV & AIDS. This information is used to sensitize planners, programme officers and communities on the nature and forms of gender based violence and how to create appropriate interventions.

62. The conference consisted of a combination of plenary and small working group sessions emphasizing a participatory approach. Topics that were discussed included, but not limited to the following:

(a) Understanding the underlying issues of GBV;

(b) Masculinity, femininity and GBV;

(c) HIV/AIDS and GBV;

(d) Interventions to fight GBV (including best practices and survivors' points of view);

(e) Promoting and implementing programmes to combat and prevent GBV;

(f) Roles of policymakers in combating and preventing GBV;

(g) Communication constraints and opportunities;

(h) Gaps and challenges in implementing GBV legislation.

63. A number of rape cases were prosecuted during the past years, and the courts imposed penalties, which provide for sentences of at least between 5 and 45 years imprisonment for convicted rapists. However, a number of factors such as limited police vehicles, lack of expertise in dealing with violence against women and children, inadequate facilities in accommodating vulnerable witnesses, and the withdrawals of cases by rape complainants after they have filed charges continue to hamper investigations and prosecutions.

64. The Legal Assistance Centre (LAC), an independent and public law interest group has been on the forefront in the fight against the scourge of Gender Based violence in Namibia. The centre has a gender research unit, which among other things deals with HIV/AIDS, Human Trafficking and Gender Based violence. The LAC has also trained government officials on issues relating to children's rights, gender and community development.

65. There are number of pieces of legislation that the Government has enacted to curb violence against women and children, namely:

- The Combating of Domestic Violence Act, Act No. 4 of 2003 – This Act introduces the concept of domestic violence into the Namibian legal system, and gives it a wide definition that includes physical abuse, sexual abuse, economic abuse, intimidation, harassment and serious emotional, verbal or psychological abuse; provides for the issuing of protection orders in domestic violence matters;
- The Combating of Rape Act, Act No. 8 of 2000 – This Act gives a broader definition of rape as a sexual act which is gender neutral, and recognizes marital rape. It also gives greater protection to girls and boys under age fourteen;
- The Combating of Immoral Practices Amendment Act, Act No. 7 of 2000 – This Act provides for penalties of either imprisonment or a heavy fine, for any person who commits or attempts to commit a sexual act with a child under the age of sixteen years and who is more than three years older than such a child;
- The Criminal Procedure Amendment Act, Act No. 24 of 2003 – This Act provides for special arrangements in court to reduce the trauma of the proceedings for vulnerable witnesses, including victims of rape and domestic violence;
- The Maintenance Act, Act No. 9 of 2003;
- The Prevention of Organised Crime Act, Act No. 29 of 2004 – This Act has a section that deals with Human Trafficking.

The Labour Act (Act No. 11 of 2007)

66. The National Gender Policy adopted in 1997 outlined the framework and set out principles for the implementation, coordination and monitoring of gender issues. In 2009, the National Gender Policy was reviewed and identified violence against women and children as one of the key areas.

67. Women and Child Protection Units (WCPU) have been established in all 13 regions of the country to handle and investigate cases relating to all sexual offences and violence against women and children.

Paragraph 21

While the Committee notes the reason why the State party recognizes only one official language, it is concerned that those persons who do not speak the official language may be discriminated against in the administration of public affairs and in the administration of justice (arts. 25, 26 and 27).

The State party should take measures to ensure, to the extent possible, that persons who only speak non-official languages used widely by the population are not denied access to public service. It should undertake measures to protect the use of such languages.

In response

68. Article 3(1) of the Namibian Constitution states that: Namibia's official language shall be English. However, Article 3(2) of the Namibian Constitution allows for the use of other languages. Articles 11(2) and 24(2) (a) of the Namibian Constitution protect the right of a detainee to be addressed in a language which he or she understands. In Namibia, people who do not speak the official language are not denied the use of their mother tongue in administration, justice, education and public service.

69. In the justice system, interpreters are provided to ensure that persons who are part of the proceedings, as the accused persons or litigants are able to participate and follow the proceedings.

70. Primary education in Namibia is divided into lower and upper primary phases covering grades 1-4 and grades 5-7 respectively. The medium of learning in this phase is the mother tongue. The Government policy provides for mother tongue education at lower primary school. A limited knowledge of English will not restrict access to justice and social facilities.

Paragraph 22

The Committee notes the absence of anti-discrimination measures for sexual minorities, such as homosexuals (arts. 17 and 26).

The State party should consider, in enacting anti-discrimination legislation, introducing the prohibition of discrimination on the ground of sexual orientation.

In response

71. Members of lesbian, gay, bisexual and transgender communities have access to public and private facilities, institutions and services. They are not persecuted for practicing same-sex activities. The Government has no intention to amend the current status of the laws of Namibia regarding same-sex marriages.

Paragraph 23

The second periodic report should be prepared in accordance with the Committee's reporting guidelines (CCPR/C/66/GU/Rev.1) and be submitted by 1 August 2008. The State party should pay particular attention to providing practical information on the implementation of legal standards existing in the country. The Committee requests that the text of the present concluding observations be published and disseminated throughout the country.

In response

72. The State Party takes note of the recommendation and will work towards ensuring that the text of the present concluding observations be published and disseminated throughout the country in all indigenous languages.

Paragraph 24

In accordance with rule 70, paragraph 5, of the Committee's rules of procedure, the State party should provide information, within one year, on its response to the Committee's recommendations contained in paragraphs 9 and 11. The Committee requests the State party to provide information in its next report on the other recommendations made and on the implementation of the Covenant as a whole.

In response

73. Namibia is attentive of its obligations to submit periodic reports and responses to the concluding observations of the relevant treaty bodies. The failure to comply with rule 70, paragraph 5, of the Committee's rules of procedure, and the delay to provide information within one year to the Committee's recommendations contained in paragraphs 9 and 11 is regrettable. This was mainly due to insufficient human and material resources as well as inappropriate internal organizational framework for multi-sectoral coordination of human rights issues with other line Ministries.

74. The above obstacles have since been overcome and Namibia hereby commits to comply with its Covenant obligations herewith.

III. Articles of the Covenant (1–27)

Article 1 – The right to self-determination of peoples

75. The people of Namibia experienced more than 100 years of colonial rule. After a lengthy liberation struggle, the country conducted its first free and fair election under the supervision of the United Nations in November 1989. Since the attainment of independence on 21 March 1990 the country has conducted internationally recognized free and fair elections at national, regional and local levels.

76. The Namibian Constitution establishes the country as a "sovereign, secular, democratic and unitary State founded upon the principles of democracy, rule of law and justice for all" with a multi-party system of Government.

77. Article 1 of the Namibian Constitution states that: "all power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State". The general population exercises these powers through regular elections.

78. Namibia has a multi-party system of Government and all citizens have the right to participate freely in all Governmental structures directly or through their freely elected representatives at the national, regional and local Government levels. Local, regional and national elections are held regularly every 5 years. Such elections are conducted in terms of the Namibian Constitution and the Electoral Act, 1992 (Act No. 24 of 1992), as amended. There is an independent Electoral Commission established in terms of section 3 of the Electoral Act, which has the exclusive authority to supervise and control in a fair and impartial manner any elections in the country.

79. The Electoral Commission consists of five persons who are appointed by the President with the approval of the National Assembly. Since the country's independence on

21 March 1990, Namibia has generally experienced political stability, peace and tranquility with one exceptional case of the armed attack at Katima Mulilo, a town in the north-eastern part of the country, by alleged secessionists on 2 August 1999. The alleged Caprivi secessionists are currently on trial and several have been acquitted and released.

80. In Namibia, all people have the right to freely determine their political status, pursue their economic, social and cultural goals, and manage and dispose of their own resources. Our laws also recognise the right of a people not to be deprived of their means of subsistence provided that it is not in conflict with the Namibian Constitution or any other law.

Articles 2 and 5 – Implementation of the Covenant at national level

Implementation under the Namibian Constitution

81. Namibia became a State party to the ICCPR in 1995. Chapters 3 of the Namibian Constitution incorporate all the fundamental human rights and freedoms contained in the ICCPR.

82. In terms of Article 23 of the Namibian Constitution the right to life, fair trial, freedom from torture and other cruel or inhuman treatments or punishment cannot be derogated from or suspended even if a state of emergency has been declared. The Namibian Constitution explicitly abolishes the death penalty.

83. By virtue of Article 144 of the Namibian Constitution, the Covenant is part of the Namibian municipal laws. The effect of Article 144 is that the rights and freedoms provided in the ICCPR are enforceable within Namibia by the judiciary and quasi-judicial bodies. The provisions of Chapter 3 of the Namibian Constitution are justiciable and fully comply with the legal obligations as spelt out in Article 2(3) of the ICCPR which provides that victims of human rights violations should be awarded remedies. The Government respects, protects and fulfils the court rulings relating to the rights contained in the ICCPR.

84. Article 5 of the Constitution further provides that the fundamental rights and freedoms enshrined in Chapter 3 shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies, and by all natural and legal persons in Namibia, and shall be enforceable by the courts.

85. Article 5 is strengthened and supported by Article 25(2) of the Namibian Constitution, which give the right to aggrieved persons who claim that their fundamental rights or freedoms guaranteed by the Namibian Constitution have been infringed, threatened or violated to approach a competent court for a remedy. In addition, Article 25(4) empowers the courts to deal with cases of human rights violations, and to award monetary compensation to the victim.

Article 3 – Equality of rights between men and women

Affirmative action programmes and gender equality

86. The policy of equal treatment practiced in Namibia is illustrated in the areas of racial discrimination and discrimination against women. Equal treatment of all races was a principle tenet of the Namibian Constitution.

87. Article 10 of the Namibian Constitution expressly prohibits discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

88. Namibian women's struggle for gender equality is not only engaged in at the social and legal levels, but also in the political arena. The Namibian Constitution prohibits gender-based discrimination. Women's civil liberties and freedom of movement is guaranteed by the Namibian Constitution (and married women can travel without their husband's permission). A woman's physical integrity is also protected under Namibian laws and there are no restrictions on women's freedom of dress. Namibia acceded to the Convention on the Elimination of All Forms of Discrimination Against Women in 1992 and ratified the Optional Protocol thereto in 2000.

89. Namibia has made progress in the promotion of the empowerment of women socially and legally, notably in the increased number of women in positions of power. There is overwhe!ming constitutional and legislative support for gender equality. A number of Government policies have been adopted to promote the economic advancement of women in an environment where women have historically been disadvantaged.

90. Namibian women have the same ownership rights as men, but are obstructed by cultural practices and tradition. Women are particularly disadvantaged as regards access to land. Government measures to address these challenges include the promulgation of the Communal Land Reform Act, Act No. 5 of 2002, in which the traditional authorities allocate the rights to use land to individuals and, men and women have equal access to communal land. In addition, many single women with children lack the technical skills to farm the land allocated to them.

91. Namibia has undertaken a lengthy and thorough review of both policy and legislation to eliminate vestiges of colonial discrimination. Namibia has a competent and progressive judiciary which has actively defended the constitutional rights of its citizens. The legislature (parliament) has already taken notice of the continued discrimination and difficulties of customary marriages, despite the fact that Article 66 of the Namibian Constitution recognizes both customary law and common law on equal footing.

92. A report containing a draft Recognition of Customary Law Marriages Bill was submitted to the Minister of Justice. One of its basic recommendations was that there should be full recognition of customary marriages just like the civil marriages.

93. Article 10 of the Constitution provides:

> "All persons shall be equal before the law;
>
> No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social economic status."

94. Our courts have applied and interpreted Article 10 of the Namibian Constitution to protect women and children against discrimination.

95. In *S v. van Wyk 1993 NR 426 (SC)*, the Court held that a racial motive for a crime could be treated as an aggravating factor in sentencing, the three separate judgments all made reference to the principle of equality and the repudiation of apartheid. The primary judgment refers to several constitutional provisions, including Articles 10 and 23, and concludes that the provisions in question:

> "demonstrate how deep and irrevocable the constitutional commitment is to, inter alia, equality before the law and non-discrimination and to the proscription and eradication of the practice of racial discrimination and apartheid and its consequences".

96. The issue regarding children born out of wedlock who cannot inherit intestate from their parents has been resolved the enactment of the Children's Status Act, Act No. 6 of 2006.

97. Section 16(2) of the Act provides that:

> "Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage".

98. Furthermore, in the case of *Frans v. Paschke and Others 2007 (2) NR 520 (HC)*, the High Court, as noted earlier, declared the common law rule disbarring children born out of wedlock invalid and unconstitutional See also the case of *Myburgh v. Commercial Bank of Namibia, 2000 NR 255 (SC)*.

99. The Communal Land Reform Act, has also resolved the issue of land rights to women who are married under customary law. Section 26(2) of the Act provides that:

> "Upon the death of the holder of a right referred to in subsection (1) such right reverts to the Chief or Traditional Authority for re-allocation forthwith:
>
> (a) To the surviving spouse of the deceased person, if such spouse consents to such allocation; or
>
> (b) In the absence of a surviving spouse, or should he or she not consent as contemplated in paragraph (a), to such child of the deceased person as the Chief or Traditional Authority determines to be entitled to the allocation of the right in accordance with customary law."

100. Based on the above mentioned provision, the Namibian Constitution and decisions of our courts, many women who have been deprived of their property by family members of the deceased were empowered. It is worth noting that some few traditional authorities in Namibia are headed by women, a good indication for women empowerment, which encourages women to participate in social, economic and domestic matters that affect them on a daily basis.

101. The Namibian Constitution states that all citizens have the right to acquire and dispose of property. The Married Persons Equality Act, Act No. 1 of 1996 grants men and women married under civil law equal access to property, and allow either spouse to exercise this right without the partner's consent. However, discrimination persists in customary marriages which are not legally required to be registered.

102. There is no legal discrimination against Namibian women in place relating to access to bank loans. The Married Persons Equality Act of 1996 specifies that a partner's consent is not required to obtain loans or enter into commercial agreements.

103. Since independence in 1990, there has been an increase of women representation in both houses of parliament (the National Council and the National Assembly) from 20% to 27%. During 2005/2009, the Deputy Prime Minister, the Deputy Speaker, the Deputy Chairperson of the National Assembly and the National Council respectively were women. In a total of 42 Ministers and Deputy Ministers, 5 ministers were female and 5 Deputy Ministers were female.

104. There have been greater improvements at the regional and local authority political levels. Out of 13 regional governors for the 13 regions, 10 are men and 3 are female.

105. The female-male ratio representation in local authorities increased from 43% to 57% in the 2004 elections and there are now 11 local authorities in which women hold a majority of seats, compared with only four in the 1992 elections. There is also no local authority without women councilors as this is required by law. Representation of women in local authority councils is far higher than it is in Parliament, the Cabinet or the judiciary or in regional councils, where women hold only eight seats out of the total of 95.

106. A number of legislation passed since 1992 contain provisions which affirm gender equality by requiring that the number of women in decision-making positions should be increased. These measures had some success in both Parliament and Regional and Local Authority Councils. However, it was not until the 1998 local authority council elections that affirmative action measures were strengthened, with a requirement that party lists should include a minimum of three women on councils with 10 members or fewer and at least five women on larger councils.

107. The following legislation was passed by Parliament to create an enabling environment for gender equality:

(a) Local Authorities Act No. 6 of 1992, as amended. This law contains an affirmative action provision which requires that all political party lists participating in local authority elections must include a specified number of women candidates, depending on the size of the council (three women for a council of 10, and five women for a larger council);

(b) Married Persons Equality Act No. 1 of 1996. This law abolishes marital power, which previously gave husbands in civil marriages all the decision making powers. It provides that spouses must agree on all important financial transaction involving their joint property;

(c) Affirmative Action (Employment) Act No. 29 of 1998. The purpose of this law is to achieve equal opportunity in employment in accordance with the provisions of the Constitution. The Act aims to redress the disadvantages arising from past discriminatory laws and practices through appropriate affirmative action plans for three designated groups. These designated groups are persons from racially disadvantaged groups, women, and persons with disabilities;

(d) Combating of Rape Act No. 8 of 2000. The Act provides for an extensive definition of rape that focuses on acts of coercion (force) used by the accused. It prescribes stiff minimum sentences for rape. It gives the complainant (the rape victim) the right to participate in bail proceedings, and imposes bail conditions that will help to protect the rape victim. The Act requires that rape cases must be heard in closed court and prohibits publications of information which could reveal the identity of the rape victim;

(e) Traditional Authorities Act No. 25 of 2000. The Act places a duty on traditional authorities to promote affirmative action amongst the members of that community, particularly by promoting women to positions of leadership;

(f) Communal Land Reform Act No. 5 of 2002. The Act governs the allocation of communal land. It provides that widows have a right to remain on communal land allocated to their late husbands, even if they had remarried. It further provides that women must be presented on the Communal Land Boards to monitor the implementation of the Act. Out of a total of 170 Communal Land Boards members, 72 are women;

(g) Combating of Domestic Violence Act No. 4 of 2003. The Act contains an extensive definition of domestic violence, including physical, sexual, economic, verbal, emotional and psychological abuse, intimidation and harassment. It also defines who is in a domestic relationship. It provides for the issuing of protection orders and police warnings in domestic violence matters. It also has provisions which should give added protection to complainants that lay criminal charges against their abusers. The Act gives police specific duties in domestic violence incidents, including the duty to help complainants get access to medical treatment and collect their personal belongings;

(h) Maintenance Act No. 9 of 2003 – This Act stipulates that all parents have a legal duty to maintain their children. Both parents share responsibility for the support of their children, regardless of whether the children are born inside or outside of a marriage

and regardless of any contradictory rules under customary laws. The Act sets out procedures for holding maintenance enquiries and for enforcing maintenance orders;

(i) The Labour Act No. 11 of 2007, which replaced the 1992 Act, makes more generous provisions for maternity benefits than the old Act. It outlaws discrimination in workplaces on the basis of pregnancy and HIV/AIDS status for the first time, and it prohibits sexual harassment and includes a clearer definition of sexual harassment;

(j) The Prevention of Organized Crime Act No. 29 of 2004. The Act specifically criminalizes trafficking in persons, slavery, kidnapping, and forced labour, including forced prostitution, child labour, and smuggling of migrants.

Article 4 – Derogation of rights (state of emergency)

108. Article 26 of the Namibian Constitution provides for the declaration of a state of emergency. Article 26 (1) of the Namibian Constitution provides that: "At a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order, the President may by Proclamation in the Gazette declare that a state of emergency exists in Namibia or any part thereof".

109. Article 26 (5)(a) of the Namibian Constitution provides as follows "During a state of emergency in terms of this Article ... the President shall have the power by Proclamation to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order".

110. In making such regulations the President is also empowered to "suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by this Constitution, for such period and subject to such conditions as are reasonably justifiable for the purposes of dealing with the situation which has given rise to the emergency."(Article 26 (5) (b) of the Namibian Constitution).

111. Article 24 of the Namibian Constitution provides for derogation from fundamental rights and freedoms if a state of emergency is declared in the country. Article 24 of the Namibian Constitution spells out a number of rights which cannot be derogated from or suspended even if a state of emergency has been declared. These are the right to life, the right to a fair trial, the right to protection from torture and other cruel or inhuman treatment or punishment, the right to freedom of thought, conscience, religion and belief, and the right to freedom of association.

112. Article 24(3) of the Namibian Constitution further provides that nothing contained in this Article shall permit a derogation from or suspension of fundamental rights or freedoms.

113. Since independence Namibia has experienced political stability, peace and tranquillity. The only exception is the case of the attack at Katima Mulilo town in the north-eastern region of Caprivi which took place on the 2nd August 1999. After the attack, the President by Proclamation (Proclamation No. 23 of 2 August 1999) declared a state of emergency which existed within the region of Caprivi. The state of emergency was lifted less than one month (around 20 days) afterwards.

Article 6 – The right to life

114. The right to life is protected under Article 6 of the Namibian Constitution, and the death sentence has been expressly prohibited. The traditional power of the courts martial to impose the death sentence for offences such as cowardice in the face of the enemy has also

been abolished by this Article. The right to life is guaranteed by Article 6 and no derogation is permitted even in time of public emergency which threatens the life of the nation.

Life expectancy (source: WHO 2009)

115. Life expectancy at birth:

Males: 64.0 years for males;

Females: 66.0 years for females;

Overall: 60.9 years.

Child Mortality

116. Namibia's Demographic and Housing Survey (NDHS) of 2005/2004 finds good progress at the outcome level when compared to both the 2000 and 1992 NDHS results. The Total Fertility Rate (TFR), a measure of the average number of children a woman is likely to have during her lifetime, has decreased by 22% from 5.4 in 1992 to 4.2 in 2000 and 3.6 in 2004.

117. The Infant Mortality Rate (IMR), that is, the number of deaths amongst children less than one year of age expressed per 1,000 live births, has decreased considerably from 57 in 1992 to 38 in 2000 but increased again to 46 in 2006. Furthermore, the under-5 mortality rate, that is, the number of children under 5 years of age, who died, out of 100,000 births was 42 in 2009 according to Global Health Observatory of 2009.

118. The health situation of the San community in the Otjozondjupa and Omaheke regions has been reportedly to be worse off as compared to the entire country. Geographically, both the Ohangwena and Kavango regions have the highest maternal mortality rates.

119. The Ministry of Health and Social Services committed itself to addressing the concern for the marginalized communities by focusing on appropriate interventions for the scattered San community. The Ministry is providing outreach services to these communities. In Ohangwena and Okavango, specific reproductive health programs are implemented. The Reproductive Health Program has been given the highest priority.

120. Immunization programmes have been expanded to address and control the child killer diseases. The Ministry increased accessibility of health services and on average most clinics are accessible within the radius of 10 km to most communities. The Ministry exempts indigent persons from payment for curative services while all Primary Health Care services are offered free of charge.

Quality of life

121. The strong Government leadership with increased donor support has been successful in rolling out anti-retroviral treatment. The number of eligible clients on ARV increased from 29,767 in 2007 to 47,963 in 2008, exceeding the Mid-Term Plan III (MTP III) target of 33,591 by 2007. There are 75,681 people who are on ARV treatment as at March 2010. ARV services increased from 43 health facilities in 2006/2007 to 57 health facilities in 2007/2008. The results from the biennial Sentinel Survey show that the of HIV/AIDS raised from 19.3% in 2000 to 22.0% in 2002,and stabilised thereafter at 19.7% in 2004 and 19.6% in 2006 to 16.8% in 2010.

122. The national goal of MTP III is to reduce the incidence of HIV/AIDS below the epidemic threshold of one percent. The Ministry has made great strides in the five components of HIV/AIDS, namely, Enabling Environment, Prevention, Access to treatment, Care and Support Services, Impact mitigation, and Integrated and Coordinated

Programme Management. These achievements included among others, launching of the National HIV/AIDS Policy in February 2008 which has been widely distributed; hosting the first National HIV/AIDS Male Leaders Conference aimed at empowering them to mainstream HIV/AIDS response to all sectors in the country.

123. In the 2007/8 financial year, 99,365 clients compared to 31,050 in 2005/2006 received HIV voluntary counseling and testing (VCT) at 250 out of 338 public health facilities as well as 17 stand-alone community VCT centers.

124. A total of 13,737 cases of all forms of TB were reported in 2008 and this indicates a reduction of 9.9 percent from 15,244 cases reported in 2007. An increase in treatment success among all forms of TB was observed during the period under review. The immunization coverage has increased from 76 percent to 80 percent.

125. The treatment success rate in new sputum smear positive PTB cases was 76 percent which is lower than the national and global target of 85%. Treatment success was negatively affected by significant number defaulters, deaths, transfers and treatment failures. In addition, the Ministry had experienced a problem of multi drug resistant (MDR) TB which added the challenges to the treatment success.

Article 7 – Prohibition of torture and cruel treatment or punishment

126. Article 8 of the Namibian Constitution prohibits torture or cruel, inhuman or degrading treatment or punishment. Article 8 is part of Chapter 3 of the Constitution which is entrenched, and may not be suspended in anyway. Article 12 (1) (f) of the Constitution provides that no court shall admit in evidence against such person testimony which has been obtained from such person in violation of Article 8 (2) (b) which prohibits torture.

127. Namibia is committed to enact legislation that would clearly define and criminalize torture in our criminal justice system. The Law Reform and Development Commission has finalized a report in which it recommends enactment of a law which would criminalize torture in Namibia.

128. Namibia is in the process of ratifying the Optional Protocol to the Convention against Torture. The Ombudsman's Office is fulfilling the functions of a national preventative mechanism by visiting prisons and all police holding cells, receives complaints from inmates and inspects the conditions of the facilities on a regular basis.

Article 8 – Slavery and forced labour

129. Article 9 of the Namibian Constitution prohibits slavery and forced labour. The Labour Act, Act No. 11 2007 also prohibits forced and child labour as well as any discrimination and sexual harassment at the work place. The Act further criminalizes child labour.

130. However, the Government still faces some challenges on child labour. In 2010 the Ministry of Labour and Social Welfare carried out investigations around the country on suspected incidents of child labour in the agricultural sector. The investigations revealed that there were more than 111 child labour cases mainly in the sectors of agriculture, livestock, domestic service, charcoal production, and the commercial sex industry.

Article 9 – The right to liberty and security of persons

131. Personal liberty is guaranteed by Article 7 of the Namibian Constitution read with Article 11 which prohibits arbitrary arrest or detention. Article 11 of the Namibian Constitution prohibits arbitrary arrest and detention. All arrested or detained persons must be brought before a magistrate or judicial officer within 48 hours of their arrest or detention where possible, failing which a person should be released from custody. In addition, such arrested persons must be informed promptly in a language which they understand of the grounds for their arrest.

132. Article 7 of the Constitution stipulates that no one shall be deprived of personal liberty, except according to the law. However, the provision specifically authorizes deprivation of liberty, such as imprisonment only if established by law.

133. In the case of *S v. Heidenreich 1995 NR 234 (HC)* the court considered what constitutes a reasonable time for the purposes of Article 12(1) (b). The court held that what is required when considering whether the time which has lapsed in bringing an accused to a trial is reasonable or not, is a balancing exercise and ultimately a value judgment. Where the trial of the accused has not taken place within a reasonable time, the accused is entitled to a relief in terms of Article 12(1) (b), which entitles him or her to be released.

134. Our courts have expressed opinions on the 48 hour rule, that what is possible or reasonably possible must be judged in light of all the prevailing circumstances in any particular case. Account must be taken of such factors as the availability of magistrate, police human resources, transport, and distances among other things. But convenience is certainly not one of such factor. Namibia has at least 33 magistrate courts countrywide, and this will enable the accused persons to appear before a magistrate within 48 hours or as soon as possible thereafter.

135. The right of the arrested and detained person to be brought before court within 48 hours as provided in Article 11(3) of the Namibian Constitution and Section 50 of the Criminal Procedure Act No. 51 of 1977, as amended, was considered in the case of *S v. Mbahapa 1991 NR 274 (HC)*. In this case, the appellant was arrested on 11 July 1990 for housebreaking. The nearest magistrate court was a periodical court which was only sitting on Thursdays. It was the intention of the police to bring the appellant before that court on Thursday, 19 July 1990. On Tuesday, 17 July 1990 the appellant escaped from cells but very soon was recaptured and appeared before the magistrate court on 26 July 1990 on a charge of escaping from lawful custody. At his trial the appellant alleged that he was assaulted on several occasions while in custody, and his defense to the charge was that he had escaped in order to avoid further injuries at the hands of the police. The magistrate rejected the appellant's evidence and convicted him. He was sentenced for 12 months imprisonment, of which six months were conditionally suspended. The housebreaking charge was withdrawn.

136. The appellant appealed against his conviction. One of the grounds was that at the time of his escape he was no longer in lawful custody and that he was accordingly entitled to escape to avoid further harm. The court held that in terms of Article 11(3), an arrested person must be brought before a magistrate within 48 hours of his arrest or he or she should be released.

137. The court held further that it is only if it is not reasonably possible to bring an arrested person before a magistrate within 48-hours period that further detention in custody is permitted and even then the detained person must be taken before a magistrate as soon as possible. The court held that the appellant had not been in lawful custody on the day when he escaped and therefore he had a good defense to the charge. The appeal was allowed and his conviction was set aside.

138. Namibian courts have lived up to the challenge to ensure that the deprivation of liberty is undertaken in strict accordance with the provisions of the Namibian Constitution. In the case of *Djama v. Government of the Republic of Namibia & Others 1992 NR 37 (HC)*; per Muller AJ, the High Court ordered the release of a suspected prohibited person because the Tribunal which was supposed to order his deportation in terms of Article 11(4) of the Namibian Constitution had not yet been established. The court relied on the prohibition against arbitrary arrest and detention in Article 11(1) of the Namibian Constitution. This is a clear example of judicial activism to protect the individual against arbitrary arrest and detention.

139. In *S v. Dausab (CC 38/2009) 2010 NAHC 122*, the court held that there is no provision in the Namibian Constitution that an accused person has a fundamental right to be released on bail. The Namibian Constitution does not in the Chapter under "Fundamental Human Rights and Freedoms" (Chapter 3) specifically refer to a right to be released on bail but it does provide for the right to a fair trial, the protection of liberty and reinforces the presumption of innocence.

140. In cases of detention or arrest, the accused persons have to apply to court to be released on bail. The court will not grant bail in certain circumstances such as if the accused person is likely to abscond, or there is likelihood that he or she may commit further offences, and therefore it would not be in the interest of justice to release him or her on bail.

141. Article 25(2) of the Namibian Constitution provides that aggrieved persons who claim that a fundamental right or freedom guaranteed by the Namibian Constitution has been infringed shall be entitled to approach a competent court to enforce or protect such right or freedom. Article 25(4) of the Namibian Constitution provides that the power of the court shall include the power to award monetary compensation in respect of any damages suffered by the aggrieved person in connection with such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of a particular case. Thus a person who is unlawfully arrested and/or imprisoned is entitled to be compensated.

Article 10 – Humane treatment of persons deprived of their liberty

142. Personal liberty is guaranteed by Article 7 read together with Article 11 of the Namibian Constitution which prohibits arbitrary arrest and detention. Deprivation of personal liberty has to be in accordance with procedures established by law.

143. The Prisons Act, Act No. 17 of 1998 regulates how prisoners should be treated. The Prisons Act sets out measures to be taken by the competent authorities to monitor the effective application of the prescribed rules regarding the treatment of prisoners. The Prisons Act provides for Visiting Justices who are obliged to inspect every part of the correctional facility, inspect and test the quality and quantity of food served and inquire into any complaint or request made by an inmate. The Prisons Act has since been replaced by the Correctional Service Act, Act No. 9 of 2012, but it has not yet been implemented.

144. The Police have an Internal Investigation Directorate which deals with complaints relating to the conduct of police officers during the execution of their duties. The issue of mechanisms to enable the verification of complaints about ill treatment at the hands of prison members is also being addressed by the Correctional Service. The new Correctional Service Act No. 9 of 2012 includes a chapter which provides for a Correctional Inspector who shall specifically conduct investigations into the problems and complaints of offenders related to decisions, recommendations, acts or omissions of Correctional Officers or any other person under the control and management of or performing services for or on behalf of the Commissioner that affect offenders either as individuals or as a group.

145. The policy regarding the separation of minors from adults in prisons and police cells has not changed. Minors have always been detained separate from adults. However, the availability of juvenile detention facilities especially in police cells is still a major challenge and the relevant line ministries are busy addressing the situation.

146. It is also the policy of the Government that convicted persons are segregated from accused persons. Accused persons or suspects waiting for trial are kept in police cells and convicted persons are kept in prisons.

147. With regard to the conditions under which contacts are allowed to the inmates with persons outside the prison, the policy of the Correctional Service has not changed. Family members and friends may visit the inmates during the designated days times (hours) during weekends and public holidays, and there are no restrictions to prison facilities if any Government body or organization wanting to visit. Prisoners are provided with three meals a day that is breakfast, lunch and dinner.

148. Concerning the measures taken to provide teaching, education, vocational guidance and others, Namibia has three rehabilitation centres. One of the centers has an irrigation agricultural farm where the inmates cultivate and produce food for other prisons in the whole country. The Correctional Service has many projects inside the prisons that keep the inmates busy and provide them with skills in the job market or they can even employ themselves upon their release. CHANGE, an NGO is helping the released inmates to prepare them for reintegration into the society through the provision of relevant skills training.

149. The majority of inmates (depending on the crime they have committed) are allowed to do some remunerative work outside for private persons, institutions or Government ministries but such arrangements must be made with the Correctional Service.

Article 11 -- The right to protection from imprisonment for failure to fulfil contractual obligations

150. Article 7 of the Namibian Constitution protects the individual's personal liberty.

151. A person can only be sent to prison for a criminal wrong and in accordance with the procedures established by law. A person cannot be sent to prison merely on the ground of inability to fulfil a contractual obligation.

152. The High Court had an occasion to review the constitutionality of a rule of law that made it possible for creditors to cause the imprisonment of debtors who are unable to pay their debts. In *Julius v. Commanding Officer, Windhoek Prison, and Others; Nel v. Commanding Officer, Windhoek Prison, and Others 1996 NR 390 (HC)*, the court declared unconstitutional some provisions of section 65 of the Magistrate Courts Act No. 32 of 1944. The issue before court was whether section 65 of the Magistrates' Courts Act, Act No. 32 of 1944 is unconstitutional. Section 65A to 65M of the Magistrates' Courts Act provides for the implementation and enforcement of judgment debts. It also provides for the magistrate to issue an order to commit the judgment debtor to prison for contempt of court for failure to pay the debt. The full bench of the High Court declared parts of section 65 of the Magistrates' Courts Act concerning imprisonment for civil debt as unconstitutional.

Article 12 – The right to freedom of movement

153. Article 21 of the Namibian Constitution guarantees freedom of movement of the individual. The right to move freely throughout Namibia, to reside and settle in any part of Namibia and to leave and return to Namibia is a constitutionally guaranteed right.

154. Article 7 of the Namibian Constitution provides that deprivation of the right to personal liberty must be in accordance with procedures established by law.

155. Women's civil liberties and freedom of movement is guaranteed by the Namibian Constitution and married women can travel without their husband's permission.

156. All persons have the right to reside in a place of their choice within Namibia. The problem arises when people erect shacks in a proclaimed area without the permission of the local authority. In this case, they will be forced to leave or face eviction for violating the local authority laws.

157. With regard to the issue of refugees and asylum seekers in Namibia, the Immigration Control Act, Act No. 7 of 1993 and the Refugees (Recognition and Control) Act, Act No. 6 of 1999 covers the issue of asylum seekers and deportation of non-nationals.

158. Namibia acceded to the Convention relating to the Status of Refugees of 1951 as well as the 1967 Protocol relating to the Status of Refugees. Parliament passed legislation in the form of the Refugees (Recognition and Control) Act of 1999 to give effect to these international instruments. This Act provides for the protection of asylum seekers and subsequent granting of refugee status depending on the circumstances of the individual asylum seeker. However, asylum seekers who fled Angola during that country's civil war were given accorded refugee status. The Government made reservations to Article 26 of the 1951 Convention. In terms of this reservation, Namibia has the right to designate a place or places for principal reception and residence for refugees or to restrict their freedom of movement. However, should any refugee or asylum seeker find an employment or study opportunity outside the refugee settlement, the Government always grants them study/employment permits to do so. In practice, the Government provides protection to refugees against expulsion or return to countries where their lives or freedom would be threatened.

159. Before the voluntary repatriation of Angolan refugees started in May 2012, there were approximately 8,500 refugees and asylum seekers resident in Namibia. Since the voluntary repatriation programme was started for Angolan refugees, 2,761 Angolan refugees were repatriated. In addition to these 3 Rwandese and 4 Burundian refugees were also repatriated voluntarily. This brings the total of voluntary repatriations to 2,768. The Angolan refugees represent 75% of the refugee population.

160. The freedom to leave and return to Namibia is a constitutionally guaranteed right. The right to leave Namibia includes the right to obtain the necessary travelling documents. The Ministry of Home Affairs and Immigration is responsible for the issuing of passports and other travelling documents. In Namibia a person who is able to provide proof of his or her Namibian citizenship and identity is entitled to a Namibian passport. He or she has to apply for a Namibian passport.

Article 13 – Deportation of aliens

161. The Namibian Government through the Immigration Tribunal may authorise the deportation of illegal/ prohibited immigrants from Namibia. The Immigration Control Act, Act No. 7 of 1993 and the Refugees (Recognition and Control) Act, Act No. 2 of 1999 cover the issue of asylum seekers and expulsion of non-nationals respectively. In practice, the Government provides protection to refugees against the principle of non-refoulement (the return of a refugee or asylum seeker to the country of origin or last residence).

162. The Immigration Tribunal which is established in terms section 43 of the Immigration Control Act, Act No. 7 of 1993, authorises the deportation of illegal/prohibited immigrants who are found in the country. In *Zhu v. Minister of Home Affairs & Another*

2004 NR 170 (HC) the High Court held that deportation cannot be imminent without a directive from the Immigration Tribunal and, any attempt by the authorities to remove the immigrant from Namibia without exhausting the provisions of the Act will be illegal and will attract not only censure but stern action from the Court. Thus, any immigrant who is ordered to leave Namibia not in accordance with the provisions of the Immigration Control Act has the right to approach the court to challenge the deportation order.

163. The expulsion of non-nationals from Namibia has to be done in accordance with the provisions of the Security Commission Act, Act No. 18 of 2001.

Article 14 – The right to equality before the courts and to a fair and public hearing by an independent court established by law

164. Chapter 9 of the Namibian Constitution deals with the administration of justice. Article 78 of the Constitution refers to the judicial powers which comprise the Supreme Court, the High Court and the Lower Courts of Namibia. The Namibian Constitution guarantees the right to protection of the law. In terms of Article 10 of the Namibian Constitution all persons are equal before the law.

165. Article 78(2) of the Namibian Constitution explicitly states that the courts are independent from the executive and the legislature, and are subject only to the Constitution and the law. In other words, the provisions of Article 78(1) clearly demonstrate that judicial independence and impartiality are protected by the highest law of the land.

166. The general jurisdiction of the Supreme Court is provided for by the Namibian Constitution. The Supreme Court is primarily a court of appeal and constitutional review. The Supreme Court Act, Act No. 15 of 1990 vests the Supreme Court with unlimited appellate jurisdiction over appeals from any judgment or order of the High Court; and any party to any such proceedings before the High Court, if dissatisfied with any such judgment or order, has a right of appeal to the Supreme Court. The Supreme Court may also exercise jurisdiction over matters referred to it by the Attorney General.

167. The High Court is a superior court of record and its jurisdiction is provided for by the Namibian Constitution and the High Court Act, Act No. 16 of 1990. The Namibian Constitution vests the High Court with both original and appellate jurisdiction. The High Court has two seats (one in Windhoek and the other one in the northern town of Oshakati).

168. The Lower Courts are established under Article 78 (1) of the Namibian Constitution. The Lower Courts in Namibia comprise magistrates' courts and community courts which are established by the Magistrates' Courts Act, Act No. 32 of 1944 and the Community Courts Act, Act No. 10 of 2003, respectively. The country has at least 33 resident magistrates' courts countrywide and a number of periodical courts. All magistrates' courts have equal civil jurisdiction. All magistrates' courts have criminal jurisdiction, but this is subject to certain limitations in respect of the seriousness of the offence, the nature of the punishment, and jurisdiction.

169. Traditional courts hear civil and minor criminal cases in rural areas on which they adjudicate for compensation of the victims only.

170. Most rural residents first encounter the legal system through the traditional court system. The Community Courts Act, Act No. 10 of 2003 provides, inter alia for the application of customary law by community courts.

Appointment and security of tenure of judges

171. According to Article 82(1) of the Namibian Constitution, all appointments of judges to the High and Supreme Courts are to be made by the President on the recommendation of the Judicial Service Commission (JSC). The Judicial Service Commission is an independent body established in terms of Article 85(1) of the Namibian Constitution and the Judicial Service Commission Act, Act No. 18 of 1995.

172. The Judicial Service Commission consists of the Chief Justice, a judge appointed by the President, the Attorney-General, and two members of the legal profession nominated (from private practice) in accordance with the provisions of an Act of Parliament by the professional organization or organization representing the interests of the legal profession in Namibia.

173. Article 82(4) of the Namibian Constitution provides that "All judges, except Acting Judges, appointed under this Constitution shall hold office until the age of 65 but the President shall be entitled to extend the retiring age of any Judge to 70. It shall also be possible by Act of Parliament to make provision for retirement at ages higher than those specified in this Article".

174. With regard to the removal of judges, Article 84 (1) of the Constitution provides that a judge may be removed from the office before the expiry of his or her tenure only by the President acting on recommendation of the JSC. The JSC is obliged to investigate whether or not a judge should be removed from the office on the given grounds, and if it decides in favour of the removal, it informs the President of its recommendation. During such investigations the judge in question may be suspended from the office.

The right to fair trial

175. Article 12 of the Namibian Constitution contains the provisions for fair trial. The criminal justice system and procedure in Namibia is governed by the Namibian Constitution and the Criminal Procedure Act, Act No. 51 of 1977. The independence of the judiciary in Namibia is respected and all persons generally have an equal opportunity to have a fair trial in court. The concept of double jeopardy is forbidden by the Namibian Constitution in terms of Article 12(2).

176. It is a principle of the Namibian legal system in the administration of justice that an accused person is presumed innocent until proven guilty. According to Article 12(1)(d) of the Namibian Constitution "all persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross examining those called against them". In criminal proceedings, the burden of proof lies with the prosecution to prove its case beyond reasonable doubt and if there is any doubt, the accused will be given the benefit of the doubt, and she or he shall be found not guilty. In civil proceedings, the standard of proof is on "the balance of probabilities".

177. One of the fundamental principles of a fair trial is that the accused be afforded the opportunity to be heard and call witnesses in his/her defense. To assist the accused persons in such processes they are entitled to be represented by a legal representative of their choice or to apply for legal aid to be provided by the state.

178. An accused person has the right to be present at trial, to consult with a legal representative of his or her choice in a timely manner, and have the right to disclosure of the evidence. In civil matters, where a summons has been properly served and the defendant does not appear, courts will proceed to hear and determine the case in the absence of the defendant.

179. Namibian courts are bound by strict rules of evidence which are derived from common law, decided cases and legislation.

180. Article 12(1) provides that court proceedings shall be carried on in open courts. However, a tribunal or court may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security.

181. A court will not admit as evidence where an involuntary confession was made by the accused. Article 12(1) (f) of the Namibian Constitution provides that no court shall admit in evidence testimony which has been obtained in violation of Article 8(2) (b), which prohibits torture.

Article 15 – Non-retroactive laws

182. Retroactive legislation is prohibited by Article 12(3) (Fair Trial) of the Namibian Constitution, which provides that – "no persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed". As is apparent, this provision only applies to criminal legislation.

Article 16 – The right to recognition before the law

183. Namibian laws recognize the legal status of natural and legal persons and their capacity to exercise rights and enter into contractual obligations. However, a person's legal capacity to act may be restricted for such reasons as minority or incapacity.

Article 17 – The right to respect of privacy, family, home and correspondence, and protection of honour and reputation

184. The right to privacy is guaranteed by Article 13 of the Namibian Constitution. The Namibian Constitution provides all citizens with the right to privacy and requires arresting officers to secure a judicial warrant before conducting a search, except in situations of national emergency.

185. The Namibian Parliament passed the Communication Act, Act No. 8 of 2009 which provides amongst other for the interception of telecommunications. However, Part 6 of the Communication Act which provides for the interception of telecommunications is not in operation as yet. Part 6 provides for the establishment of interception centers which are necessary for the combating of crime and national security. Interception centres are staffed by such staff members in the Namibia Central Intelligence Service (NCIS) as may be designated by the Director-General with the approval of the Security Commission established by Article 114(1) of the Namibian Constitution.

186. The Communication Act stipulates that before a staff member (NCIS) performs any function in relation to interception or monitoring of telecommunications contemplated in Part 6, he or she must be present before the Judge-President in chambers and make an oath and obtain consent of a judge. The Act makes provision for penalties and offences for contravention of the provisions of the Act.

Protection of honour and reputation

187. Article 21 of the Namibian Constitution provides for fundamental freedoms, which include the right to freedom of speech and expression. Article 21(2) provides that the limitation of a fundamental freedom entrenched in article 21(1) is permissible if the limitation is one that arises from law that imposes reasonable restrictions on the exercise of

the rights that are necessary in a democratic society and are required for "the interests of sovereignty and integrity of Namibia, national security, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence".

188. The law of defamation protects people against unlawful attacks on honour and reputation. In the case of *Trustco Group International Ltd and Others v. Shikongo 2010 (2) NR 377 (SC)*, it was noted that the law of defamation in Namibia is based on the *actio injuriarum* of Roman law. To succeed in a defamation action, a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (*animo injuriandi*). In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion. If the plaintiff proves his/her claim on the balance of probability, the court will award damages.

189. This case therefore clearly demonstrates that the Namibian Courts have positively defended the honour and reputation of persons.

Article 18 – The right to freedom of thought, conscience and religion

190. In terms of Article 1 of the Namibian Constitution, Namibia is a secular state and freedom of religion is one of the fundamental rights in the Namibian Constitution. Article 21(1) (b) and (c) of the Namibian Constitution stipulates that all persons shall have the right to freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning and freedom to practise any religion and to manifest such practice.

Article 19 – The right to freedom of expression

Media

191. Media freedom exists in Namibia since independence. According to Reporters Without Borders, the 2010 World Press Freedom Index rankings, Namibia tops Africa placing Namibia in the 20th position internationally on press freedom. It is one of the more media-friendly countries in Africa. Freedom of speech, expression and freedom of the press and other media is guaranteed under Article 21 of the Namibian Constitution and on the whole this freedom is respected by the Government. Parliament enacted legislation like the Broadcasting Act, Act No. 9 of 1991 and Namibia Communications Commission Act No. 4 of 1992 to provide the legal framework to govern and create a liberal environment for the media in the country. In 2009, the Editor's Forum of media in Namibia established the office of the Media Ombudsman as a self-regulatory mechanism without any government interference. There is no report about a journalist who has been killed or imprisoned because of his/her work.

192. The Namibia Broadcasting Corporation (NBC), which is the only public broadcaster, has 8 radio services and one television channel. It broadcasts in 6 languages from Windhoek and in almost all the indigenous languages from transmitters in the areas where indigenous languages are predominantly spoken. There is one privately owned television channel, One Africa television, Namibia's most popular commercial free-to air TV station. Other international channels via cable satellite include as the BBC, CNN and SABC Africa. There are around 20 private and community radio stations, BBC World channels which are available, and Radio France Internationale broadcasts on FM in the capital.

193. The Namibian Broadcasting Corporation (NBC) and the private press give coverage to opposition parties, including views very critical of the Government. Over the years the media has continued to operate in an environment essentially free of Government or ruling party interference. The media, particularly the community radios have contributed significantly to the public availability of information and are used as a tool to communicate with family and relatives who live in other towns and in the rural areas. The newspapers are also seen as valuable in the fight against corruption and sensitize citizens on human rights issues.

194. In spite of its small population, Namibia has a varied and lively press. There are a number of print Medias, five of these are dailies – *the Namibian* (English and Oshiwambo), *Die Republikein* (Afrikaans and English), *Allgemeine Zeitung* (German), *New Era* (English and Silozi) and *Namibia Sun* in English and other indigenous languages. The *Namib Times* appears only twice a week, and seven others appear weekly – *the Windhoek Observer*, *the Villager*, *Confidente*, the *Economist*, *Informante*, *the Southern Times* and *Namibia Today*, all published in English. *Insight Namibia* was lodged in 2004 as a monthly current affairs magazine based on investigative reporting. *Prime Focus* is Namibia's other leading business and lifestyles magazine, highlighting people and organizations that contribute to the growth of the country

195. Namibia upholds and promotes the fundamental freedom of association and that of the press. The existence of several unions, professional groups and free media, has always kept Government accountable. Trade unions have made several demands on terms and conditions of service and at some point questioned Government decisions on the remuneration of political office bearers. Student associations have raised concerns on education matters such as study loans.

Article 20 – Prohibition of propaganda for war, national, racial or religious hatred

196. Article 21 of the Namibian Constitution provides for fundamental freedom and this includes freedom of speech. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination is prohibited in Namibia. Freedom of speech can be limited by the fundamental rights relating to dignity, equality and non-discrimination.

197. The issue of racial comments came before our courts in the case of *Kauesa v. Minister of Home Affairs 1995 NR 102 (HC)*. In this case, Kauesa appeared on national television and made racial comments against white police officers. The High Court stated that freedom of speech can be limited by the fundamental rights relating to dignity, equality and non-discrimination and legislation enacted in accordance with the Namibian Constitution, namely the Racial Discrimination Prohibition Act of 1991, and that corollary to these was a prohibition on hate or racist speech, which the court defined as speech inciting hatred and prejudice on the grounds of race, colour, ethnic origin, creed or religion. The Court gave a number of compelling reasons why hate speech was not protected under the mantle of the freedom of speech and expression. The Racial Discrimination Prohibition Act No. 26 of 1991 criminalises acts of racial discrimination, prohibiting the propagation of racial discrimination and the practice of apartheid. Section 11 of the Racial Discrimination Prohibition Amendment Act 1998 (Act No. 26 of 1998) strictly prohibit any incitements to violence by anyone in the country.

Article 21 – The right to peaceful assembly

198. This right enjoys constitutional protection in our legal system under Article 21 read together with Article 17 of the Namibian Constitution. This right and freedom is only protected provided the assembly or demonstration takes place peacefully and without arms. The Public Gatherings Proclamation (AG.23 of 1989), makes it an offence to carry weapons at a public gathering. The provisions of the Proclamation are also applicable to election campaigning, religious gathering, celebrations and other demonstration. The Proclamation requires any party or an organization to inform the police and to be given permission before any such gathering could take place. However, the police have no powers to unreasonably refuse to grant the permission without valid grounds.

Article 22 – The right to freedom of association

199. The Constitution provides for freedom of association, including freedom to form and join trade unions, and the Government respects these rights in practice. The Labour Act, Act No. 6 of 1992 laid the foundation for sound labour practices in Namibia. The 1992 Labour Act excluded the most vulnerable groups such as farm workers and domestic workers from overtime arrangements. This resulted in the enactment of Labour Act No. 11 of 2007 which sets the current framework for Namibia's labour relations and working conditions.

200. The 2007 Act extended rights to public servants, farm workers, and domestic employees. Trade unions have no difficulties to register their unions, and there are no Government restrictions on who may serve as a union official. The law provides a process for employers to recognize trade unions and protection of its members and the organizers. The law also empowers the Labour Court which sits as a High Court to remedy unfair labour practices and explicitly forbids unfair dismissals. The Labour Act prohibits forced and bonded labour by adults and children.

201. Sections 53 and 54 of the Labour Act make provision and set requirements for the establishment of trade unions in Namibia except for members of the Namibian Defence and Police Forces. These provisions have been practically applied in Namibia, and as a result, a total of 47 trade unions and 3 federations have been registered since 1992. Trade unions represent about 450,000 employees in both the public and private sectors. Their memberships are cross-sectoral, industrial and sometimes trade based. Members of the administration of the public service have equal rights to form and belong to trade unions of their choice. They can also go on strike like any other employees in the other sectors.

202. The Labour Act allows trade unions to form federations and to join international trade union organizations of their own choice without any legal or practical restrictions. The only restrictions placed on the functioning of trade unions are those in sections 53(3) of the Labour Act. However, if a trade union chooses not to be legally registered there are no consequences except that such a union is not recognized by law and hence does not enjoy trade union privileges and rights such as consultation on relevant issues and state funding to attend international meetings.

203. The Labour Act has put in place measures to promote free collective bargaining principles and processes at the enterprise, industrial and national levels. Many trade unions have concluded and entered Procedural and Recognition Agreements with different employers on labour and employment issues. Also the statutory tripartite Labour Advisory Council has taken similar approaches.

Article 23 – Protection of the family, the right to marriage and equality of the spouses

204. Article 14 of the Namibian Constitution states that: "Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

205. In addition to the constitutional provision, the common law makes it difficult to institute divorce actions on the grounds other than those grounds recognized in the Act. In Namibia, marriages are solemnized by a marriage officer in the magistrate court and by a Pastor or Priest of various churches. Divorce proceedings can only be instituted in and an order for divorce can only be granted by the High Court.

206. As stated under Article 16 of Namibia's initial report under the Convention on the Elimination of All Forms of Discrimination against Women, in Namibia the concept of "family" goes far beyond the nuclear family to include grandparents, aunts, uncles, cousins and other extended family members.

Measures in place protecting the family

207. It is Government policy that married persons should, where possible not be deployed far from their family home. In addition to the constitutional provision the Common Divorce Law also makes it difficult to institute divorce action on any ground not recognized by the Act and thereby protects the institution of marriage and preservation of the family. The services of social and family counselling are available and are provided by Government social workers at hospitals across the country. Some religions do not allow married couples to divorce. A traditional marriage requires the advice of the parents and the elders of the couple, before they can be dissolved.

208. The law also makes provision for maintenance such as:

(a) The Maintenance Act, Act No. 9 of 2003. The Act places a legal duty on parents to maintain their children. The Act applies to all persons who have a legal duty to maintain, another person regardless of the nature of the relationship;

(b) The Motor Vehicle Accident Fund Act, Act No. 10 of 2007 repealed and replaced the old Acts of 1991 and 2001. The new Act re-defines the purpose of the Fund from a fault based system in which negligence had to be proven before a claimant could get compensated to a 'no fault' based system where the focus has shifted to a system geared towards providing a social security safety net for those who would unfortunately be involved in motor vehicle accidents. The Fund provides for maintenance to the family in the case of the death or serious injuries of the bread winner;

(c) The Government Institutions Pension Fund (GIPF) was created to manage and pay out the pension and other benefits of public service employees. The rules of the Fund require that every employee should nominate his or her dependant(s) as beneficiaries in case of his or her death;

(d) The constitutional provisions of Art. 12(1) (f) of the Namibian Constitution, protects individuals from testifying against themselves and their spouses in court of law;

(e) The Criminal Procedure Act, Act No. 51 of 1977 (CPA) also protect spouses from testifying in criminal cases against their spouses.

Consent to Marriage

209. Over 28% of the population aged 15 years and above are either married under civil or traditional laws. Only 19% are married under the civil laws. The never married person's population forms the highest proportion, which is 56%. On the other hand, 7% of the population is made up of couples on consensual unions, in other words they consider themselves married but have not formalized the union either legally or traditionally. The proportion of the widowed and divorced/separated population is close to 7%. However, there are relatively more widowed and divorced or separated for both females and males.

210. Article 14 of the Namibian Constitution provides that marriage shall be entered into only with the free and full consent of the intending spouses, between a man and woman of full age without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status. Furthermore both men and women of 18 years and older, have the right and are allowed by law to marry and found a family. Civil marriages in Namibia are regulated by the Marriage Act of 1961 and the Married Persons Equality Act, Act No. 1 of 1996. The most important aspect of the 1996 Act was the abolition of the common law rule that the husbands had marital power over their wives. The effect of these changes was that married women became fully emancipated, with the right to enter into contractual agreements, own property, act as directors of companies and bind themselves as surety.

211. Customary laws do not set a minimum age for marriage, but marriage generally does not take place before puberty, or before the attainment of an acceptable level of social maturity. Family consent is generally required for a marriage to take place. In most communities the consent of both the intending spouses is generally necessary, as well. A customary law marriage involves a series of negotiations between two family groups and creates rights and responsibilities between all family members. The LRDC has recommended enactment of legislation on the recognition of customary law marriages.

Article 24 – The rights of the child

212. The Namibian Constitution contains provisions that protect and promote children's rights such as the rights to a name, nationality, the right to education, the right to know and be cared for by their parents, protection against economic exploitation and hazardous work, and protection against detention under the age of 16 years.

213. Namibia ratified the Convention on the Rights of the Child and the Optional Protocols thereto in 1990, during its first year as a nation. Two years later the initial report to the treaty body was submitted. The second and third periodic reports were submitted in 2009. Since independence Namibia has undertaken a broad programme and policies including enacting legislation to improve the social wellbeing and safety of the children in Namibia. The Government established the Ministry of Gender Equality and Child Welfare to focus more on the needs of women and children.

Birth registration of children

214. Namibia was among the first African countries to ratify the Convention on the Rights of the Child, which states that all children have the right to be registered immediately after birth. The Ministry of Home Affairs and Immigration is responsible for the normal birth registration and issuing of birth certificates of both new born babies and other persons. In the near future, the Ministry together with the Ministry of Health and Social Services are planning to expand birth registration points around the country especially to hospitals which already started in September 2008 in respect of all the babies born in hospitals. These babies are registered immediately and are issued with birth certificate before being discharged from the hospital. The Ministry of Home Affairs and

Immigration has set up satellite offices at all major State hospitals where registration can be done immediately after birth.

Article 25 – The right to participate in public affairs, voting rights and the right of equal access to public service

215. The people of Namibia experienced more than 100 years of colonial rule. After a lengthy liberation struggle, the country conducted its first free and fair election under the supervision of the United Nations in November 1989. Article 1 of the Namibian Constitution states that "all power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State". The general population exercises these powers through regular elections.

216. Since independence, Namibia has successfully completed the transition from white-minority-apartheid rule to constitutional and multiparty democracy which has been maintained through periodic and regular elections. National, regional and local authority elections are held regularly every 5 years. Namibian citizens are free to take part in public affairs. This means they can exercise the right to vote and being able to stand as a candidate for any public office.

217. Namibia has a multi-party system of Government and all citizens have the right to participate freely in all Governmental structures directly or through their freely elected representatives at the national, regional and local Government levels. Such elections are conducted in terms of the Namibian Constitution and Electoral Act, 1992 (Act No. 24 of 1992) as amended. The Act provide for the establishment of an independent Electoral Commission, which supervise and control any elections in the country. The Electoral Commission consists of five persons appointed by the President.

218. Namibia last held Presidential and National Assembly elections on 27 and 28 November 2009. International and domestic observers characterized both elections as free and fair and as reflecting the will of the electorate. Eight opposition parties won a total of 18 seats. However, some opposition parties approached the High Court to contest the fairness of the elections. The opposition parties claimed that the Electoral Commission had violated the election laws during the counting process and applied to the High Court to declare the election results null and void alternatively for a recount of the votes. The Supreme Court held that although there were discrepancies in the outcome of the elections, these were due to administrative shortcomings and not due to election rigging as was alleged by the parties.

219. In order to ensure that this exercise is successful, a well-coordinated voter's education campaign is conducted in cooperation with local media institutions aimed at increasing voter turn-out. The second objective of the media campaigns of the Electoral Commission of Namibia (ECN) is to guarantee that all eligible voters understand and participate in the electoral processes that include voter registration, legal environment that protect their rights to vote in secrecy and peace and the actual voting process that lead to the final results of an election.

220. Voter registration and voting processes are voluntary. For a person to be able to vote in any election in Namibia, he/she has to produce his or her official ECN voter registration card, valid for that specific election and issued by the ECN.

221. Any applicant who is aspiring to be registered as a voter must be:

- A Namibian citizen,
- 18 years of age;

- He/she must be able to be identified by someone else who has already registered;
- Must provide proof of having been resident in the Local Authority Area (where he or she applied to be registered as a voter and produce copies of his or her municipal or telephone accounts) for 12 consecutive months or longer [applicable to Local Authority elections only].

222. In Namibia all citizens are subject to the law, and have an equal access to the public service. Considering the colonial history of the country during which time the policy and the laws of the colonial occupying power were systematically aimed at disadvantaging the majority black population, the framers of the Namibian Constitution not only condemned racism and apartheid, colonial regime, but also attempted to correct some of the wrongs of the past.

223. To this end, Parliament was empowered by the Namibian Constitution to promulgate affirmative action legislation aimed at achieving a balanced structuring of the personnel establishment of the public service, including the police, the defence force and the correctional service.

224. Article 23 of the Namibian Constitution provides that "nothing contained in Article 10 shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service".

225. Since Article 23 of the Namibian Constitution promotes affirmative action in general terms, it has the danger of leaving the interpretation of the constitutional provision to the whims of individual employers and other key players. Such a situation will in turn tend to promote arbitrariness and breaches of human rights. To avoid these pitfalls, the Government has passed the Affirmative (Employment) Action Act, (Act No. 29 of 1998) which provides for affirmative action measures to achieve equal opportunity in employment for racially disadvantaged persons, women and persons with disabilities. The Public Service Commission has also implemented affirmative action programmes on the authority of Article 23 of the Constitution.

Article 26 – Equality and equal protection before the law

226. Article 10 of the Namibian Constitution provides for equality before the law and freedom from discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. This is the closest that the Namibian Constitution gets to the recognition of group or minority rights; the persons protected by the provisions are all said to belong to a certain group, whether a natural or one formed by choice.

Article 27 – The rights of minorities

227. In the past, various groups in Namibia were largely deprived of the enjoyment of their rights, because of apartheid. However, after independence the Government identified certain communities which were particularly deprived and to this end has implemented support programs to raise their standard of living in line with its development programs. These marginalized groups are the San, the Ovatue, and Ovatjimba communities.

228. Namibia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples. There are approximately 40 000 San people in Namibia, but only about 2000 of them still follow a traditional way of life. The Government is committed to ensure that the San people are fully integrated in the mainstream society and economy.

229. The Ministry of Home Affairs and Immigration has employed mobile teams in all 13 regions to visit the most remote areas of the country to assist citizens and especially the marginalized groups in obtaining national identity documents.

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